

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA :
 :
 vs. :
 :
 DYLANN STORM ROOF : 2:15 - CR - 472

Phone Conference in the above matter held on Friday,
October 21, 2016, commencing at 1:00 p.m., before the
Hon. Richard M. Gergel, in the United States Courthouse,
Courtroom VI, 85 Broad St., Charleston, South Carolina,
29401.

APPEARED VIA TELEPHONE ON BEHALF OF THE UNITED STATES:

JAY N. RICHARDSON, ESQ., 1441 Main St., Columbia, SC.

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APPEARED VIA TELEPHONE ON BEHALF OF THE DEFENSE:

DAVID I. BRUCK, ESQ., Washington & Lee School of Law,
Lexington, VA.

REPORTED BY DEBRA L. POTOCKI, RMR, RDR, CRR
Official Court Reporter for the U.S. District Court
P.O. Box 835
Charleston, SC 29402
843/723-2208

1:00:26PM 1 THE COURT: Let me, for the record, this is in the
2 matter of United States of America versus Dylann Storm Roof,
3 2:15-472.

1:00:33PM 4 Could counsel identify themselves for the record who will
5 be speaking during this argument?

1:00:38PM 6 MR. RICHARDSON: Jay Richardson from the Government,
7 Your Honor.

1:00:41PM 8 MR. BRUCK: David Bruck for the defendant.

1:00:44PM 9 THE COURT: Counsel, let me just sort of go through,
10 I've received these dueling memoranda, it's a little hard for
11 me to keep up with them all, but let me just sort of walk
12 through the issues as I've listed them, and let's just see --
13 and if there are others, you can bring them to my attention.

1:01:06PM14 First of all regarding the location of examination.
15 Mr. Richardson, is there any reason we can not do it at the
16 jail?

1:01:14PM17 MR. RICHARDSON: There's no reason it can not be done
18 there, Your Honor.

1:01:17PM19 THE COURT: I order it to be done at the detention
20 center.

1:01:20PM21 MR. RICHARDSON: Thank you.

1:01:22PM22 THE COURT: Secondly, there seemed to have been some
23 confusion about the duty of disclosure, and I'm going to put a
24 little bit on myself. I thought I had done it, that I
25 expected that the defendant and the Government would have

1 reciprocal disclosure, that is, both the kinds of mental
2 health experts that the party -- the Government intends to
3 call, as well as the tests and examinations to be performed.

1:01:50PM 4 The Government apparently couldn't find anything in an
5 order, because I just thought it was there and it wasn't, to
6 make clear that the standard imposed on the defendant
7 regarding disclosure on June 30 was intended also to be
8 imposed on the Government.

1:02:05PM 9 So I'm going to issue an order today clarifying that so
10 there's no confusion. So, Mr. Richardson, you need to
11 supplement your disclosure to disclose the kinds of mental
12 health experts the Government intends to call.

1:02:20PM 13 MR. RICHARDSON: Okay.

1:02:21PM 14 THE COURT: Okay. Third issue. Mr. Bruck has
15 expressed concern about whether it's understood that the
16 Government has a duty, its expert's duty to maintain
17 confidentiality. I am not sure there really is confusion, but
18 let me see if I can set forth, and, Mr. Bruck, if this
19 satisfies your concern.

1:02:46PM 20 I have no problem, I don't think there's any problem with
21 the Government experts sharing information among themselves.
22 But basically, other than to deliver the sealed -- the things
23 to the Court under Docket 260, they should not be disclosing
24 it to anyone else. Do we have any dispute about that until
25 the provisions of Rule 12.2(c)(2) are met? Do we have any

1 dispute about that?

1:03:18PM 2 MR. RICHARDSON: Not from the Government, Your Honor.
3 It's our understanding that -- That is exactly our
4 understanding.

1:03:23PM 5 THE COURT: Mr. Bruck, does that satisfy your
6 concerns? I'm going to put that in an order to make it clear.

1:03:29PM 7 MR. BRUCK: Well, it does, except for the somewhat
8 open-ended -- until now, what has been the somewhat open-ended
9 description of who the Government's experts are. We don't
10 know how many, we don't know --

1:03:44PM 11 THE COURT: Right. What you're going to get is a
12 disclosure of the kinds of experts. Their disclosure should
13 look very similar to your disclosure.

1:03:53PM 14 MR. BRUCK: Okay.

1:03:55PM 15 THE COURT: Fourth. Video recording.
16 Mr. Richardson, could you explain to me what the Government
17 wants to use the video recording for? Because we obviously
18 originally had intended it as a way to validate the
19 examination.

1:04:10PM 20 MR. RICHARDSON: That's correct, Your Honor, it's to
21 validate examination, but it's also so that our examining
22 expert need not be trying to furiously take notes at the same
23 time he's trying to have the discussion.

1:04:24PM 24 THE COURT: Let me stop you on that, first of all.
25 Mr. Bruck, do you have any problem with the examining expert

1 to be able to go back over the videotape as he's preparing his
2 evaluation and report?

1:04:34PM 3 MR. BRUCK: Well, you know, our position was that the
4 sole purpose of the videotape was to keep -- was to ensure
5 that our client wouldn't be misquoted.

1:04:46PM 6 THE COURT: That's okay, but there's also -- and you
7 and I both know there's case law out there that allows this --
8 what's the problem with the expert himself going back over it,
9 so that he doesn't have to sit and write down verbatim what's
10 said?

1:05:02PM 11 MR. BRUCK: Well, I mean, we've stated our position.
12 I don't --

1:05:05PM 13 THE COURT: Okay. I'm going to allow that.

1:05:06PM 14 Now, how about there was this discussion about
15 distributing it to other experts, and I understood the
16 government counsel to say that it would withhold distribution
17 to anyone until after the Rule 12.2(c)(2) requirements have
18 been met.

1:05:28PM 19 Is that right, Mr. Richardson?

1:05:30PM 20 MR. RICHARDSON: That's certainly fine with the
21 Government, Your Honor, we will limit it to the evaluating
22 expert, until the defense makes its disclosure.

1:05:40PM 23 THE COURT: And then once you disclose it to the
24 defense experts, if those requirements are satisfied, you have
25 no authority, you understand you have no authority to disclose

1 it to anyone else, correct?

1:05:54PM 2 MR. RICHARDSON: Well, the only person -- that's why
3 I was trying to make clear -- the only person we would ask to
4 be able to disclose it to at that point would be our other
5 experts.

1:06:03PM 6 THE COURT: That's not a problem. Anybody else?

1:06:05PM 7 MR. BRUCK: Well, if I may, Your Honor?

1:06:06PM 8 THE COURT: Yes.

1:06:07PM 9 MR. BRUCK: You know, I think at that point the --
10 we're -- the purpose of the videotape has sort of lost, you
11 know, become unmoored from the original purpose. It now is
12 going to be used to strengthen or consolidate or reinforce the
13 opinions of experts who have never met the defendant, never
14 laid eyes on him. It's hard to see how that --

1:06:39PM 15 THE COURT: Mr. Bruck, speak a little louder; we're
16 having trouble picking you up.

1:06:41PM 17 MR. BRUCK: I'm sorry, excuse me. You know, the
18 Court had identified two purposes for the videotape, one is as
19 a protection for the defendant and the other is to make sure
20 that the examining expert doesn't have to take notes and can
21 have an accurate record for his own evaluation.

1:07:00PM 22 THE COURT: Okay.

1:07:01PM 23 MR. BRUCK: To then share the videotape with the
24 other government examiners, seems to go beyond that, even
25 though it's after the point when it then allows them to, in

1 effect, reinforce or, you know, sort of build upon and
2 strengthen their own opinions after their work has been
3 completed, for a reason that doesn't really -- that goes
4 beyond any of the original reasons for the videotaping. And
5 really turns it from, you know, a tool of convenience and a
6 protection for the defendant, into more of an aggressive or an
7 adversarial tool for the Government. And it, you know, that's
8 the whole problem with this balance that has to be struck.

1:07:51PM 9 THE COURT: Let me hear from Mr. Richardson. Why do
10 your other experts need to see it, to -- presumably they're
11 going to get your examining expert's report; what other reason
12 do they need it?

1:08:03PM 13 MR. RICHARDSON: Your Honor, I think in order -- I
14 mean, it's a little hard to know, right, because we don't know
15 what these opinions are going to be. But the concern I've got
16 is that we've got experts who are going to be potentially
17 offering opinions, and they should be able to see the results
18 and reports, both from the defense, but also the results and
19 reports, which includes the video from the Government, in
20 ensuring that their opinions take into account all the
21 necessary information.

1:08:32PM 22 THE COURT: Let's do this. I'm not going to -- I'm
23 going to -- if you have a specific reason to show it to one of
24 your experts, if your examining expert's report for some
25 reason is a problem, has a problem, they need to see the

1 video, you can move before me, and I will consider it under
2 the facts that exist and the particular expert and the reason
3 justification. But I'm not going to allow it at this point,
4 but I'm going to hold it in abeyance pending a need for it.
5 Okay?

1:09:01PM 6 MR. RICHARDSON: And so I'm sure the Court's going to
7 write all this out.

1:09:05PM 8 THE COURT: Yes.

1:09:06PM 9 MR. RICHARDSON: Just so I'm clear, the video is not
10 to be provided, absent court order, to any expert outside the
11 examining expert.

1:09:15PM 12 THE COURT: Correct. But I'm not ruling that you're
13 not allowed to do that, I'm going to leave it. I want to
14 hear, you know, your expert will have been given the examining
15 expert's report. And one thing I would want to know is, well,
16 why do they need additional information. You know, we are
17 starting to ship around this video, and for more purposes than
18 we intended, and I just want to make sure there's adequate
19 justification before we do that.

1:09:40PM 20 MR. RICHARDSON: That's certainly fine by the
21 Government, Your Honor.

1:09:42PM 22 THE COURT: Okay. Mr. Bruck, does that relieve your
23 concerns at this point?

1:09:46PM 24 MR. BRUCK: Yes, it does.

1:09:47PM 25 THE COURT: Folks, the idea of these -- of telling

1 the experts what tests to perform, I'm not willing to do that,
2 Mr. Bruck. I've looked at this issue, I'm very familiar with
3 these tests, and, you know, it's easy to envision how they are
4 relevant to rebuttal. I am going to hold the Government to
5 using only -- they only can have rebuttal evidence, okay, it's
6 got to be rebuttal evidence. But I'm not going to second
7 guess these experts and their expertise about what tests they
8 need, but I'm not preventing you, at a later point, once you
9 receive these reports, if you believe that there is something
10 improper about that testimony, and you wish to challenge their
11 expert opinion or the use of those reports, I will give you an
12 opportunity to do that.

1:10:40PM13 MR. BRUCK: Very well.

1:10:40PM14 THE COURT: Okay?

1:10:41PM15 MR. BRUCK: Yes, sir.

1:10:42PM16 THE COURT: Now, I've gone through my list. Are
17 there additional issues to address?

1:10:49PM18 MR. BRUCK: I think that has covered everything that
19 we had. I think Sarah Gannett may have joined the call, and
20 if so, and if I have missed something.

1:10:58PM21 THE COURT: It's always good to have your lawyer on
22 the phone, Mr. Bruck.

1:11:02PM23 MR. BRUCK: Absolutely. You got that right.

1:11:04PM24 MS. GANNETT: I think that covers our -- as well.

1:11:12PM25 MR. BRUCK: That's my back-up.

1:11:13PM 1 THE COURT: Anything else we need to address today?

1:11:16PM 2 MR. RICHARDSON: Your Honor, I have one issue, if you
3 don't mind taking this up. We've discussed this with defense
4 counsel. And one of the plans that we are discussing here is
5 running a criminal background check on the prospective jurors.
6 We would, of course, provide that information as soon as it
7 was run, to defense counsel, so that they would have the same
8 information that we do. But we have some concern that if
9 someone failed, inadvertently or intentionally, to disclose
10 that information, that that might become a problem down the
11 road. And so we wanted to at least advise the Court of that,
12 and mainly just make sure that the Court doesn't have some
13 objection to us doing that, that we did not anticipate.

1:12:06PM14 THE COURT: Mr. Bruck, what's your view of that?

1:12:09PM15 MR. BRUCK: I'm not entirely sure I understand the
16 problem. Mr. Richardson tells us that they're going to run
17 criminal background checks and provide us with the entire run,
18 the entire result.

1:12:22PM19 THE COURT: Correct.

1:12:23PM20 MR. BRUCK: So both sides have the same information.
21 What is -- Maybe I'm just dense, but what is the Government's
22 concern? It does often happen that jurors fail to provide
23 their criminal background.

1:12:35PM24 THE COURT: Yeah, I just can't imagine how having
25 that information harms anybody.

1:12:39PM 1 MR. BRUCK: Right.

1:12:40PM 2 MR. RICHARDSON: I agree, I just -- I didn't want to
3 go do it without making the Court aware, that's all.

1:12:46PM 4 THE COURT: And I know -- I say this, it's obvious --
5 obviously the prospective jurors will not know you did it,
6 because there's no disclosure of that, right?

1:12:55PM 7 MR. RICHARDSON: That is correct. The only exception
8 to that potentially being if the criminal history revealed a
9 conviction that had not been disclosed, then we would
10 potentially ask the Court to inquire of those facts in voir
11 dire.

1:13:10PM 12 THE COURT: How quickly are you able to do this?

1:13:13PM 13 MR. RICHARDSON: Well, that's -- I don't know the
14 answer to that question. We are attempting to start that
15 process. I wanted to at least notify the Court that we were
16 doing it. But I think it will probably take us a week or
17 better to run, you know, this, you know, now I think after
18 strikes, 600 jurors that are left.

1:13:35PM 19 THE COURT: Well, let me suggest this. Start with
20 Juror No. 1, because we're never going to get to Juror 785,
21 okay?

1:13:45PM 22 MR. RICHARDSON: That was our plan, Your Honor.

1:13:46PM 23 THE COURT: You hear what I'm saying? I thought you
24 might. And as you get it, you know, start providing it to
25 Mr. Bruck, so that, you know, the first week or so they could

1 go ahead and process that. Obviously someone who
2 misrepresented their criminal history, we ought to all be a
3 little skeptical about, you know, but I'm not going to make a
4 final decision based -- we have to determine what exactly it
5 was and the circumstances of it.

1:14:13PM 6 MR. RICHARDSON: That is exactly our plan. We
7 will -- I may not start this afternoon, just given Government
8 employees' schedules, but we will certainly get them started
9 first thing Monday morning.

1:14:48PM 10 THE COURT: Okay. Folks, I'm fine with that.
11 Mr. Bruck, anything you need to raise?

1:14:52PM 12 MR. BRUCK: Yes, sir, just one additional issue that
13 has occurred to me since we've been on the phone. And that is
14 that normally when the -- you know, we have not disclosed the
15 names of our experts, and the Government apparently -- or not
16 apparently -- the Government does not intend to disclose the
17 names of their experts.

1:15:15PM 18 THE COURT: Correct.

1:15:16PM 19 MR. BRUCK: But then this is another one of those
20 examples of why this is not actually a level -- it's supposed
21 to be a level playing field. And the reason I say that is
22 that the Government discloses its expert when he goes to the
23 jail and introduces himself to the defendant, unless he is
24 going to be wearing a black hood, normally.

1:15:37PM 25 THE COURT: Don't give them any ideas, Mr. Bruck.

1:15:42PM 1 MR. BRUCK: You know, he'll introduce himself, and
2 our client will know who he has been talking to, and he can
3 tell us the first time we confer with him.

1:15:52PM 4 So we're going to get the name of the -- I guess I'd call
5 him or her the primary evaluator.

1:15:59PM 6 THE COURT: Let's just say the examining expert.

1:16:01PM 7 MR. BRUCK: The examining expert. The wrinkle is
8 that we now have or about to be provided further notice of
9 remote experts. And that, it seems to me, changes what the
10 rule clearly contemplated, which is that the defendant is
11 going to meet whoever is evaluating him, and will know, not in
12 advance, but at the start of each session of the evaluation,
13 who the Government's experts are. By having every -- all but
14 one expert do their work remotely, without ever coming face to
15 face with the defendant, that structure is altered in a way
16 that could not have been foreseen by the drafters of the rule.

1:16:50PM 17 And keeping in mind, as we always have to, throughout all
18 of this, that the Government is intruding on the defendant's
19 Fifth Amendment privilege not, in effect, to be deposed prior
20 to trial, which is exactly what this is.

1:17:06PM 21 So the idea that, well, we didn't provide the names of our
22 experts, and, therefore, it's perfectly fair that the
23 Government should gain this added advantage, doesn't really
24 compute. These are not parallel situations.

1:17:20PM 25 And so I think to really -- to follow the way that Rule

1 12.2 was expected to work, and has worked in every other case,
2 because this is an unusual approach the Government is taking,
3 unprecedented but unusual, I think it's only fair that when
4 the Government provides notice of the experts who are going to
5 evaluate our client from afar, that we be told who they are.

1:17:46PM 6 THE COURT: Mr. Richardson, your response?

1:17:49PM 7 MR. RICHARDSON: Your Honor, we oppose doing that.

8 We think that the playing field here is that they provided a
9 list of experts. It is true that they will learn by necessity
10 the identity of our examining expert when that examination
11 occurs. But we do not think that the letter of Rule 12.2,
12 which is what the defendant has demanded, requires or indeed
13 needs the Government to make unilateral disclosure of its
14 experts.

1:18:18PM 15 THE COURT: I agree. Okay. Any other issues?

1:18:24PM 16 MR. GANNETT: Your Honor, this is Sarah Gannett, and

17 I think I am going to act a little bit too much like a lawyer
18 for a moment. But just in case this is unclear, and for
19 the -- at least for the record, I wanted to clarify one thing
20 about the videotape and the use of the videotape. And that is
21 that the video itself is not a result of the examination in
22 the sense that a report or test results would be. The
23 videotape is preserving the examination for the purposes that
24 Your Honor and Mr. Bruck were discussing. And my one concern
25 about the discussion that we've been having about the

1 videotape is that it all points up what a slippery slope this
2 is. Once we have a videotape, and once the Government
3 examiner gets to use it and review it in preparing the report,
4 and once we set aside for another day whether other experts
5 will get to use it, then there can be a lot of thought and a
6 lot of study put into justifying how it becomes evidence in
7 the case, as opposed to a tool to preserve what happened in
8 the examination for the defendant's benefit, especially if
9 their expert gets to study it in preparing his report, and
10 gets to think about, you know, what are the ways that we can
11 use to justify further disclosures of it to other experts.
12 And I just want to point up that problem at this point before
13 we get too far down the road to considering what the many
14 potential reasons that could be conceived might be.

1:20:16PM15 THE COURT: Well, thank you, Miss Gannett. You know,
16 what I'm trying to do is just postpone having to deal with
17 that issue, to first determine whether we need to, that is,
18 whether anyone has any need to do it. I'm very mindful that
19 the purpose of the 12.2 examination is rebuttal, it's not to
20 generate evidence to independently -- some independent
21 evidence against the defendant. It is rebuttal evidence.

1:20:44PM22 But I'm going to postpone to a later point any discussion
23 when there's shown to be some need to provide it. It may well
24 be we don't need to address these issues. Because no one will
25 have a need for it. And what I found in this job is, I don't

1 need to be answering questions I don't need to answer. There
2 are a enough of the ones I do need to answer, that I don't go
3 looking for ones that may one day not really require an
4 answer.

1:21:11PM 5 So I appreciate what you're saying. We'll wait until a
6 later date to address this issue.

1:21:16PM 7 MS. GANNETT: Thank you, Your Honor.

1:21:17PM 8 THE COURT: Anything further?

1:21:19PM 9 MR. BRUCK: One very quick final point. The reply
10 that I've filed all of about two hours ago --

1:21:27PM11 THE COURT: Yeah.

1:21:28PM12 MR. BRUCK: May have inartfully made it appear that
13 we were only pressing the two issues that were raised in that
14 reply. I just would like to make it clear for the record that
15 we stood on all of the positions we took in our -- stand on
16 all of the objections that we made in our initial pleading
17 No. 480.

1:21:47PM18 THE COURT: In fact, I addressed issues you didn't
19 raise in this thing in your reply, because I understood that.
20 Okay?

1:21:54PM21 MR. BRUCK: Thank you.

1:21:55PM22 THE COURT: Thank you. Good afternoon. Everyone
23 have a good weekend.

1:21:58PM24

1:21:58PM25 (Court adjourned at 1:21 p.m.)

REPORTER'S CERTIFICATION

I, Debra L. Potocki, RMR, RDR, CRR, Official Court
Reporter for the United States District Court for the District
of South Carolina, hereby certify that the foregoing is a true
and correct transcript of the stenographically recorded above
proceedings.

S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR

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